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ENGLISH CIVIL LAW *

I

A WRITER who, at the present day, should venture to offer any remarks of a general nature on English Law might well be asked to show his credentials. It may, accordingly, be mentioned, that the writer of these articles has, during the past thirteen years, been engaged, in happy conjunction with four of his former colleagues of the Oxford Law School, in a thorough and systematic examination of the whole body of the civil law of England — *i. e.*, the law governing the relations of English citizens with one another. Further, not only have he and they searched the evidence, but they have bound themselves to state the result in its most compact and logical form — a task which has involved the keenest and most thorough discussion of disputed points, and an elaborate winnowing of the chaff from the grain. And, whilst it would be claiming too much to allege that each one of the 2200 and odd paragraphs of the Digest of English Civil Law¹ represents the individual opinion of all the five authors of that work (such a claim would, in effect, be its own condemnation), it is true

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¹ DIGEST OF ENGLISH CIVIL LAW. By Edward Jenks (editor), W. M. Geldart, W. S. Holdsworth, R. W. Lee, and J. C. Miles. (Boston, U. S. A.; Boston Book Co., London (England); Butterworth & Co. 1905-16.) Referred to in these pages as the 'DIGEST.'

to say, that no one of these paragraphs has appeared in print without being subject to the scrutiny of at least three critics, whose criticism was none the less keen that it was entirely friendly. At least the writer of these pages, upon whom, as editor of the work, the shafts of criticism most fiercely fell, will hardly forget, whilst life lasts, the long arguments, sometimes prolonged almost to the point of physical exhaustion, which heralded the birth of some of the most contentious paragraphs of the Digest.

The writer and his colleagues would fain hope that this work, though it cannot claim the full tale of Fortescue's *viginti annorum lucubrationes*, may be of some use to the students and practitioners of English Law, and fill an unique, if modest, niche in the temple of legal literature. At any rate, it seems not unfair to claim that its editor, under whose hands the image slowly grew, must have made some close acquaintance with the materials of which it is carved.

The very fact that such a task has been accomplished, even with moderate success,² would seem to be in itself of some importance as a refutation of the obscurantist theory, at one time widely prevalent, that English Law (or at least much of it) is incapable of being stated in the form of simple rules or principles. The advocates of this view would appear to have been blind to the grave imputation which it cast upon a system which they profess to admire; but it is not improbable that their attitude, in so far as it was not the result of mere conservative prejudice, was due to an imperfect apprehension of the difference between a Digest and a Code. The terms are, no doubt, used inconsistently by jurists; but, whatever the terms used, there is a clear distinction between a Code which professes to provide for all possible cases, and a Digest which merely professes to state in orderly form authoritative rules of law. That English Law is yet ripe, or ever will be, for codification in the sense above defined, may well be doubted; certainly the writer is not prepared to discuss here the wisdom of proposals for codification. But, as the success of the Sale of Goods Act, the Bills of Exchange

² The authors of the DIGEST may fairly pride themselves upon the fact that, in the eleven years during which the work has been in the press, no mistake of any importance has been discovered in the text. One or two omissions have been detected; and a certain number of changes in the law have been made while the work has been in progress. These have been duly noted in the *Errata* and *Corrigenda* of later volumes, and will be incorporated into the reissue of the completed work.

Act, and the Partnership Act, has shown, the rich materials of English Law may with advantage be moulded into accessible and logical form. And, though the writer believes that he is speaking for his colleagues as well as for himself in disclaiming any comparison with those triumphs of the draftsman's art, he ventures to think that the *Digest of English Civil Law* has shown that the process may be extended a good deal further than it has at present gone.

Another of the obvious lessons learned (or confirmed) from the thirteen years of hard labour which have gone to the making of the Digest, is a realization of the extraordinary inequalities which mark the different parts of the civil law of England. The English Law of Contract, for example, is scientific and complete; it assumed scientific form at a happy time, just when the genius of Lord Mansfield had incorporated the Law Merchant (surely a priceless adoption) into English Law. Had the structure been earlier framed, it might well have been cramped and inelastic; the archaic 'special contracts' which survive alongside the innominate contracts of modern business, and stand in such puzzling relationship to the general theory of contract,³ are warnings of what might have happened. But they have had their uses in building up a scientific theory, though as models they 'leave to be desired.' A friendly reviewer of the second volume of the Digest expended a certain amount of genial 'chaff' upon a sentence in the Preface to that volume, which spoke of Gaming Contracts as 'social relationships regulated by law'; but the writer of the Preface is wholly unrepentant, for he believes that the primitive and deep-seated gambling instinct of the English race has played no small part in the evolution of the peculiarly English institution of the simple contract, and that the hundreds of lost and forgotten dice recovered from the ancient floor of the Middle Temple Hall may have had a closer connection with the theory of contract than has hitherto been guessed. Still, he would not deny, that the somewhat arbitrary rules which govern the Special Contracts dealt with in the third volume of the Digest, were well superseded by the simpler rules which now apply to innominate contracts.

The English Law of Property, though different in many ways from the Law of Contract, resembles it in fullness and minuteness.

³ The true relationship of these two parts of the Law of Contract has been suggested in the Preface to Vol. III of the DIGEST.

In fact, so minute is it, that it not only provides two sets of rules, the one dealing with land, the other with movables;⁴ but in one corner of its field of operations it actually provides three alternative sets of rules for a single process, varying with the hands to which that process is entrusted. Thus, if an insolvent estate is administered by executors out of Court (surely a rash proceeding!), the old rules of equity, as they stood at the passing of the Judicature Acts, govern the case. If the estate is being administered by the Chancery Division, these rules are modified by such (but only such) of the bankruptcy rules as are incorporated into that administration by section 10 of the Judicature Act, 1875. If the proceedings are in the bankruptcy jurisdiction, all the bankruptcy rules (with slight modifications) apply. Surely this is excess of zeal.

But if in some directions the English Law of Property is minute and detailed, in others it is extraordinarily incomplete. Thus, while it is possible to state with reasonable precision most of the rules of Real Property Law, yet, for want of an authoritative background, these rules must inevitably appear, to a student unacquainted with the history and the atmosphere of the system, arbitrary to the last degree. The author of Book III of the Digest has endeavoured to state, in the first Title of that Book, the fundamental principles upon which these rules are based; but, like Mr. William Lloyd Garrison's coloured interviewer, and for similar reasons, he will not attempt to disguise from his readers the fact that he has been obliged to supplement his text with a strictly unpermissible buttress of notes, and that, even with such assistance, he has laid himself open to the criticism of a learned friend, who observed that the Book was sadly oblivious of the 'mystery of seisin.'

As for property in movables, the English system has frankly given up in despair any attempt to formulate scientific rules on that subject, and has, substantially speaking, contented itself with dealing only with possession. Analytical jurists, who are seldom less convincing than when they venture to draw conclusions from that history which they ostentatiously profess to despise, have, it

⁴ The narrowness of the territory common to both subjects may be realized from a glance at the scanty proportions of Bk. III, Sect. XV, of the DIGEST. But a certain allowance should be made for testamentary disposition.

is believed, claimed this fact as a proof of the very debatable proposition, that property is the outcome of possession ripened by length of time and legal protection. To the writer, this doctrine appears to be, not only anarchical, and even immoral, but opposed to the well-known facts of English legal history. Surely the Writ of Right, and even the Grand Assize, are older than the Possessory Assizes and the Writ of Trespass; and, though the common law doctrine of larceny was based upon trespass, there is no evidence that the older English law of theft grew out of a law which protected seisin or possession. The matter is, perhaps, strictly irrelevant; but the truth seems to be, that, long ere the distinction between property and possession is recognized, primitive legal systems recognize some kinds of association between persons and material objects as a 'right' which is, at first, no doubt, inconceivable as existing apart from physical control, but which is at least as much proprietary as possessory in its character. And when the time comes for the specialization of ideas to be effected, it is, apparently, possession, rather than property, which is the conscious production of juristic speculation. At least, such appears to be the teaching of English Law; and it is supported by the facts of other systems.

And if we ask why, for example, the common law devoted itself to the protection of the possession, rather than the ownership, of movables, the answer given by English legal history appears to be, that the invention of the great Writ of Trespass, introduced in the interests of public order, and the increasing sharpness of the notion of possession which resulted from it, were found so convenient, with a little adaptation, for deciding indirectly questions of ownership of chattels, that the need of a true proprietary process did not appear urgent. A similar result led to the practical disappearance from land law of the Writ of Right in the century following the invention of the Writ of Trespass; but it may be shrewdly suspected that, so long as the local courts continued to be active tribunals, a good deal was heard in them of questions of title.

If we turn now from the Law of Contract and the Law of Property to Family Law and the Law of Torts, we shall be struck at once by the comparative poverty of these two important branches of English Law. It is assuredly no fault of Professor Geldart that Book IV of the Digest is so scanty, and that much even of its

scanty contents (*e. g.*, the Law of Marriage and Divorce) would appear to fall almost as fitly under Public as Private Law. The Law of Guardianship, for example, which bulks so largely in Continental systems, is, in English Law, a mere fragment.⁵ This fact is commonly explained, in the writings of English jurists, by a reference to the completeness and efficiency of the peculiarly English Law of Trusts.⁶ But this explanation does not carry us very far. Why does English Law leave to the Law of Trusts the regulation of those important matters which, in most systems of law, are governed by the Law of Guardianship? Is it not significant that, while the Law of Guardianship is what may fairly be called a compulsory system, in which the conduct of the guardian is directed and controlled by the authority of the State, the Law of Trusts is a voluntary system, in which the duties of the trustee and the rights of the beneficiaries are prescribed (sometimes very minutely) by the founder of the trust? It is, no doubt, true, that English Law, in that special department of it known as 'Equity,' has laid down an elaborate system of rules for enforcing the administration of trusts; but these are, substantially in every case, 'subject to the provisions of the settlement.'

Again, it was actually suggested by one of the authors of the Digest, that a complete statement of English Family Law would include the Law of Intestate Succession; and there is, obviously, much to be said for this view. But, apart from the inconvenience of abandoning traditional arrangements, it was felt by the editor that the adoption of this suggestion would really tend to obscure one of the most striking peculiarities of English Law, *viz.*, the unfettered testamentary power wielded by the English parent. Whatever may be the case in systems which have preserved a law of *legitim*, which prevents a parent disinheriting his family without due cause, in English Law intestate succession is, both in theory and practice, at the present day, merely a provision for the careless or unfortunate person who dies without leaving a valid will. It is only in the last resort, that the provisions of the Inheritance Act and the Statutes of Distribution are prayed in aid. The fate of Faulkes de Breanté has been laid to heart by the English nation.⁷

⁵ DIGEST, Bk. IV, Sect. II, Tit. III and IV (42 §§).

⁶ *Ibid.*, Bk. III, Sect. XVII (70 §§).

⁷ 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 356.

Once again, we may note, that English Family Law is not only very scanty, but, comparatively speaking, very modern. Apart from the well-known provision of the Statute of Merton (1235) on the subject of post-legitimation,⁸ and that of the Statute of Marlborough (1267) on waste by guardians,⁹ there is practically no statute law of any importance in this branch until we come to the Reformation, with its quarrels over Church jurisdiction, and the establishment of the Poor Law system under Elizabeth.¹⁰ Even these important changes were, as has been before hinted, effected far more in the interests of the community as a whole than of the members of the family, or even of the family as a unit. Not until the definite putting away of feudalism at the Restoration, and the subsequent laborious reconstruction of society on a contractual basis, do we begin to get a real development of Family Law; and by that time the Trust is too firmly fixed an institution to give way before general rules. Indeed, the subsequent sweeping away of the few restrictions on testamentary power which still survived from the Middle Ages seemed but to emphasize the emancipation of the family from the bonds of law.¹¹

What is the explanation of this peculiarity of English Law? It is customary to attribute it to the legendary 'individualism' of the English character; and it may be that, when we come to dig a little deeper into the foundations of English Law, we shall have to allow some ultimate weight to this alleged psychological element. But is there not a more definite historical explanation, which will at least suggest proximate causes?

We know too little at present of pre-Norman English Law to dogmatize about social conditions before the Conquest; but we shall probably not be far wrong in assuming that the typical patriarchal household, with its apparent despotism strongly fettered by local custom, prevailed largely amongst English folk of that time. It seems to be very doubtful whether any but privileged persons could make wills; and what little we know of the Anglo-

⁸ 20 HEN. III, cap. 9.

⁹ 52 HEN. III, cap. 17.

¹⁰ The writer does not forget the provisions of the Statute of Westminster II (1285) on the subject of 'ravishment of ward.' But these, though technically unrepealed, have long been obsolete.

¹¹ See the writer's *SHORT HISTORY OF ENGLISH LAW* (Little, Brown & Co.), pp. 273-74.

Saxon law of inheritance and succession, leads us to suppose that it provided carefully for an adjustment of family claims.¹²

But this system, whatever it was, received a rude shock from the feudal influences of the Conquest, with their strong preference for the single heir; and there seem quite substantial reasons to believe that, for at least a century after the Battle of Hastings, the Norman lawyers succeeded in subordinating to him the claims of the family on the death of its head, not merely as regards land (for which there were some military reasons) but as regards chattels as well.¹³ The natural consequence of such an extreme application of the doctrines of feudalism was to produce a violent struggle for the right of testation; and, so far as chattels were concerned, this struggle appears to have been successful (mainly through the help of the Church, which, for its own reasons, favoured it) by about the end of the twelfth century. It is common knowledge that, as regards land, the struggle was more prolonged, and that a formal victory was not achieved until the Reformation. But, at least a century earlier, the position had virtually been carried by insidious sapping, through the medium of uses; and the result of the long struggle seems to have produced a rule as extreme in another direction as that which it had superseded. Only by virtue of a few local customs which (as mentioned) were swept away in the eighteenth century, was there any restriction left, after 1660, on the victorious power of testation.

If the English Law of Torts is less fragmentary than Family Law, it cannot be described as highly developed or scientific. English Law evidently believes in the existence of a certain class of wrongs which give rise to actions for damages calculated on common law principles, but which are neither breaches of contract nor of trust. The *devastavit* of the personal representative is also (probably) not, technically, a tort, because it was originally an ecclesiastical offence; though the same may also be said of slander, which now ranks as a tort. But of any substantive definition of a tort English Law is still innocent. It is at present only in the pre-

¹² The evidence comes chiefly from the surviving rules of gavel-kind, 'borough-English,' and local customs generally.

¹³ *SHORT HISTORY OF ENGLISH LAW*, pp. 61-65. Doubtless the heir was expected (as the Assise of Northampton puts it) to 'make the division of the deceased.' But his power must have been great.

liminary stage, in which it says, this act or that is a tort, this or that is not. It is in the position of the rustic who knows by experience that the ale at certain houses is good; but, not being able to read the signs, does not connect this experience with the fact that all these houses supply X.'s ale.

Again, the Law of Torts, though it will always award 'damages' (*i. e.*, pecuniary compensation for damage) to a successful plaintiff, does not always require, as an essential to the plaintiff's success, that he should have suffered 'material damage in fact.' There are some torts which are actionable *per se*; that is to say, there are acts which entitle certain persons to sue for damages, though they have not, in fact, suffered damage from them. This kind of tort is usually, in Continental systems, treated as an adjunct of the criminal law, in which the *partie civile* is allowed to appear alongside the public prosecutor and put in a subsidiary claim for damages.¹⁴ And, therefore, the English Law of Torts, incomplete though it be, is, generally, more comprehensive and detailed than the corresponding branch of Continental systems. But still, even in this connection, it does not say that every crime is a tort against any person who may have directly suffered by it. Thus, if A. forges B.'s signature, B. has no action against A.; even though B. may, in fact, have been seriously damaged by the crime. On the other hand, every unlawful assault is both a tort and a crime by English Law; though, again, every trespass to land¹⁵ or chattels is not, albeit the origin of all three torts is the same. There is, seemingly, no general rule on the subject.

Nothing is more characteristic of the English Law of Torts than the importance which it attaches to acts, as distinguished from omissions. This quality is, doubtless, due largely to the quasi-criminal character of the early remedies in tort, and to the fact that every crime is, historically as well as technically, a breach of the King's peace.¹⁶ But whereas criminal law, especially in its

¹⁴ *e. g.*, French *Code d'Instruction Criminelle*, arts. 363, 366, 368; Belgian, arts. 585, 587.

¹⁵ The writer believes that, until the seventeenth century, it remained quite uncertain whether the common trespass to land was definitely to emerge as a crime, and that until well on into the eighteenth it was commonly treated by rural magistrates as such. Fielding's novels contain useful hints as to the devices adopted to justify this practice.

¹⁶ Even at the present day the doctrine is, in practice, expressly repeated in all indictments; though the technical necessity for laying every indictable offence as

earlier stages, lays great stress upon the *mens rea*, the Law of Torts seems early to have abandoned this idea, without completely adopting the alternative essential of substantial damage to the plaintiff. Thus the English Law of Torts is partly an instrument for punishing reprehensible conduct — a sort of minor criminal law — and partly an instrument for adjusting economic compensation; and, as is usually the case when a person wavers between inconsistent ideals, it very imperfectly attains either object. It is one of the oddest freaks in the history of ideas, that the archaic notion which sees in every accident causing physical damage a direct and obvious purpose, should have survived into the English Law of Torts, in the ‘absolute liability’ for the harbouring of dangerous animals,¹⁷ and that this archaic survival should really be one of the most complete and justifiable examples of the function which the Law of Torts performs in adjusting economic compensation. But this simple principle of compensation, unfortunately, goes a very little way in that system, which, for the rest of its scope, wavers persistently, in fixing the rules of tortious liability, between the intention, unskilfulness, carelessness, or other fault of the defendant, and the hardship suffered by the plaintiff. The controversy which raged round the recent case of *Hulton v. Jones*,¹⁸ and the admitted hopelessness of all attempts to frame a satisfactory definition of ‘malice’ for purposes of the Law of Torts, are convincing testimony to the vague and unscientific character of that branch of English Law.

The insistence of the English Law of Torts on acts, as distinguished from omissions, as of the essence of the vast majority of recognized torts, has been already alluded to; but the point is so striking a characteristic of English Law, that it may be permissible to dwell for a moment upon it. The tortious omission is known as ‘negligence’; and inasmuch as, for purposes of civil law, the difference between deliberate and unconscious omission of a positive duty is, at least in theory, immaterial, we need not spend time in distin-

‘against the peace of our Sovereign Lord the King’ seems to have been abolished by the Criminal Procedure Act, 1851, s. 24.

¹⁷ DIGEST, Bk. II, Pt. III, B. Sect. I, Tit. V, § 784.

¹⁸ [1910] L. R. A. C. 20. This case finally decided that ‘malice in fact’ is in no sense necessary to defamation. The point had been decided 300 years before *Jones v. Hulton* (in *Mercer’s Case*, Jenk. 268 (1586)); but the decision seems to have been forgotten.

guishing between omissions and deliberate forbearances or abstentions. But it is desirable to point out, that the scantiness of the civil Law of Negligence in England is obscured by the practice, adopted by English textbook writers,¹⁹ of including in the 'Law of Negligence' the vast subjects of breaches of contract and even of trust, which, though the former has, doubtless, grown historically out of the Law of Tort²⁰ (a fact which should not be forgotten), are clearly differentiated from it by the fact that they are breaches of duties voluntarily, and, in most cases, expressly undertaken. The true Law of Negligence is that which holds a person responsible, *ex lege immediatē*, for omissions of positive duty imposed upon him, merely as a member of the community, by the law. The writer has elsewhere²¹ insisted on the narrow scope and late development of this branch of the English Law of Torts; but a vivid realization of the fact may be obtained by a glance at the Title of the Digest²² in which that law is embodied, where it will be found to occupy only seven paragraphs, of which only one²³ really imposes specific duties. If the reader takes the trouble to turn to this paragraph, he will find that except upon persons professing special skill in a recognized calling, upon the handlers of dangerous goods, and upon occupiers of land, the English Law of Torts imposes (apart from special agreement) no positive duties whatsoever which can be enforced by an action for damages.²⁴ At the present day, a passer-by who sees a man struggling for his life in a canal, and who, being perfectly able to render or procure help without the slightest real inconvenience (much less danger) to himself, should calmly continue his walk without making any effort at rescue, incurs no civil (probably no criminal) liability by English Law. This state of

¹⁹ *e. g.*, the late Mr. Beven, in his well-known work, *NEGLIGENCE IN LAW*, 2 ed., 1908. See especially Vol. II.

²⁰ As is well known, the action of *Assumpsit*, the typical action of contract till the forms of action were abolished, was originally an action on the case for negligence or deceit.

²¹ In 'Negligence and Deceit in the Law of Torts,' 26 *L. QUART. REV.* 159 (1910).

²² Bk. II, Pt. III, Sect. I, Tit. I, §§ 728-34.

²³ § 731.

²⁴ Possibly an exception to this statement should be made in favour of the offence known as a *devastavit*, which, though not, technically, a tort (see *ante*, p. 8) undoubtedly gives rise to an action for damages. But, after all, the personal representative is very like a trustee who has voluntarily undertaken a trust. He cannot be compelled to accept the appointment.

things is so monstrous, that it is with little surprise that we find that at least one well-meaning attempt to remedy it has been made by the judicial bench.²⁵ But the fate which those attempts have met is not such as to encourage further efforts in the same direction; and the gap remains a most serious disfigurement of the common law.

One other, not quite so conspicuous feature of English Civil Law, may be noticed, before we come to what is, perhaps, its most striking and suggestive formal characteristic. During the past half century, social and economic conditions in England have changed (or have seemed to change) with startling rapidity. The banding together of both capital and labour into vast associations for collective dealing, the almost complete substitution of mechanical for animal means of transport, the spread of elementary and technical education, with the consequent revolution in the conditions of many industries — to name only three of the most striking changes — must, one would suppose, if the test were possible, render English life of to-day almost unrecognizable by one whose experience ended in the middle of the nineteenth century. And this view is, at first sight, confirmed by the enormous bulk of the legislation which has emanated from Westminster in the interval. But appearances are here deceptive. A more careful study of the Statute Book for the last fifty years will show how surprisingly little of this vast bulk of legislation directly affects the civil law. When we have deducted from the average annual volume the statutes rendered necessary by the ordinary administrative work of the year — the Finance Acts, the Army Act, the statutes providing for the rearrangement of State machinery (the statutes dealing with the vast increase of State activities — public health, education, trade, temperance legislation, and the like), the statutes dealing with mere legal procedure such as Bankruptcy Acts, the criminal statutes (which have of recent years been very numerous), and the statutes which merely consolidate or codify portions of the law — there is surprisingly little left. And much the same may be said of the judicial decisions of the period. The numerous volumes in which these are contained show a vast number of decisions upon minor points of application, but comparatively few precedents

²⁵ See the well-known judgment of Lord Esher in *Heaven v. Pender*, 11 Q. B. D. 503, 509 (1883).

which mark a real addition to or change in the law. This truth has come home to the Editor of the Digest in a rather forcible way. It has been his duty, as the successive volumes appeared, to note, in the table of *Errata* and *Corrigenda* prefixed to each, the recent changes in the law which have rendered any statement in the previous volumes obsolete or incorrect. Though he has fulfilled this duty to the best of his ability during the last ten years, the tale of his labours has been light, as may be seen by reference to the tables in question; and the impression left upon his mind is one of immense fixity and unchangeableness in the fundamental principles of English Civil Law. This fact may be noted for philosophical consideration hereafter.

Meanwhile, it would seem almost superfluous to call attention at this date to what is familiar to all students of English Law as its most striking and characteristic feature, *viz.*, the overwhelming importance, both in bulk and character, of that part of its principles which rests on judicial decisions. In a general way, this knowledge is commonplace; and a writer who should allude to it might fairly be accused of wasting his reader's time. But it is not quite certain that the full extent of the characteristic is realized by all who profess a lip acquaintance with it; and, in the writer's humble judgment, its full significance is not always understood.

It is, perhaps, difficult to express, in arithmetical terms, the proportion which judiciary law bears to statutory law in the English civil system. But the writer has made a somewhat detailed effort in that direction, and confesses himself startled to find that whereas, to state in fairly complete form the fundamental rules of English Civil Law, it has been found necessary to quote about 1450 statutory provisions (each section of a statute being counted as a separate provision), the same task has required references to not less than 7000 judicial decisions. This fact may, however, be said to be meaningless, unless some estimate be made of the comparative shares contributed by each source of authority to this result. Perhaps, therefore, a sounder conclusion may be drawn from the fact that, out of the 2200 propositions in which, as mentioned at the beginning of this article, the English Civil Law has been embodied in the Digest, only about 800 rest in any way on statutory authority, while not less than 1400 rest on judicial decisions alone. Even this comparison does not, however, bring out the full contribu-

tion of the English judiciary to the substance of English Civil Law; for it leaves out of account the fact that two or three of the most frequently quoted statutes, such as the Sale of Goods Act and the Partnership Act, are little more than codified judiciary law, and ought, therefore, fairly to be reckoned as the work of English judges. If allowance be made for these, it seems absolutely fair to say that, as nearly as arithmetical calculation in such a case can go, two thirds of the fundamental rules of the existing English Civil Law have been contributed by the labours of English judges.

And, if we turn from bulk to quality, what a splendid memorial that is to the high sense of justice, the acuteness of intellect, the patience, the industry, of a long line of illustrious occupants of the English Bench. That there have been mistakes, cannot be denied. The doctrine of 'common employment' can hardly be regarded as a happy effort of judiciary law. The series of decisions which has made of the 'tied house system' so sacred a thing that even Parliament now finds itself helpless to abolish it, is not precisely that aspect of English case law of which the admirers of the system are most proud. The efforts of the Courts to build up a rational law of corporate liability have not been entirely successful. The decision in *Poulton v. L. S. W. Railway Co.*,²⁶ which virtually laid it down that a corporate employer is not liable for the torts of its servants unless it was within its power to authorize them, was, to put it quite plainly, an unfortunate step, which has caused much trouble and some injustice. But, with all allowance for occasional mistakes, a perusal of the 7000 decisions upon which English Civil Law rests, to say nothing of the many others which have been rejected as merely expository, has left upon the writer's mind, as, doubtless, on the minds of others, a feeling of the most profound admiration for the work of the English Bench in the performance of its historic task, and a firm conviction that, in no other way hitherto attempted, could the task of building up the English Civil Law have been so well achieved. These feelings lead naturally to a difficult question: By what authority, and out of what materials, has this task been undertaken and performed? An attempt to answer this question in the light of historical knowledge may lead

²⁶ L. R. 2 Q. B. 534 (1867). The true doctrine is, that an employer is liable for the torts of his servant committed within the scope of his (the servant's) employment.

to interesting conclusions, and, perhaps, to a not wholly orthodox view of the true nature of law.

It is common knowledge, that English judges, at least the judges of the common law jurisdiction,²⁷ have for many generations steadily refused to admit that they make new law; and that, when faced by the apparent contradiction of creative precedents, they have asserted that even these were no true 'legislation' ²⁸ — *i. e.*, making of new law, but merely an application of existing principles to new facts. This is clearly the Blackstonian theory, put forward with all Blackstone's charm of style and persuasiveness in the Introduction to his famous Commentaries;²⁹ and much of the rather cheap criticism and ridicule to which it has been subjected seems really to be quite groundless. We have learned a good deal since Blackstone's day about the origin of the common law (in its restricted sense of law which was formulated only in the judgments of the old courts of the King's Bench, Common Pleas, and Exchequer); and the more we learn of it, the more support do we find, in the facts of history, for the old theory of the common law judges. Shortly put, it may be said to be now the accepted view, that the 'common law' (in the restricted sense alluded to above) is the result of the efforts of the King's judges, mainly in the thirteenth and fourteenth centuries, to build up, out of the varying customs of the different parts of England, that 'common custom of the realm' which Blackstone,³⁰ in the passage just referred to, regards as the equivalent of the common law, and which it was necessary to establish, if England was to become a single commonwealth. The comparison between the Roman Prætor and the English Chancellor at a slightly later stage in the history of English Law, is so familiar as to be almost hackneyed; but it is not always seen that the resemblance between the *jus gentium* applied by the Prætor and the common law administered by the earlier English judges, is equally striking, not merely in the nature of its materials, but in the meth-

²⁷ The apparently contrary claim put forward by the late Sir George Jessel for the Equity judges in *re Hallett*, 13 Ch. D. 711 (1879), is also well known; but it may be doubted whether Sir George Jessel's words were used in quite the sense in which they are commonly understood.

²⁸ This is an unfortunate term, if it is intended to convey a distinction between old and new law. 'Legislation' is a question of form, not of essence.

²⁹ Introduction, § 3, p. 69.

³⁰ *Op. cit.*, p. 67.

ods of its formulation. There is, in fact, a far greater resemblance between the Register of Writs and the Prætor's Edict, with its list of *formulae*, than between the Edict and the vague processes of the early days of Equity.

But another almost equally important fact in the history of English Law is not so well known; and it deserves to be mentioned here, as it serves to clear away an unnecessary complication, and to reduce to uniformity a process which has hitherto been regarded as manifesting itself in two somewhat inconsistent ways.

It is common to assume, that the special branch of English Law known as 'Equity' did not make its appearance until after the common law, as embodied in the Register of Writs, had virtually ceased to be an expanding system, owing either to the restraints imposed on the invention of new writs by the jealousy of the newly-created Parliament, or to the growing conservatism of the common law judges. This is a natural assumption from the fact that the separate jurisdiction of the Chancellor became prominent just at the time when the Register of Writs (despite the well-known provision of the Statute of Westminster the Second³¹) was practically closed. But recent researches³² seem to place it almost beyond dispute that, at a considerably earlier date, not merely the grievances, but even the remedies, which we have been wont to associate peculiarly with the Court of Chancery, were familiar to the common law tribunals, and, what is more, that they were dealt with and administered, not only in Westminster Hall, but also on the local circuits. The truth appears to be, that English 'common law' and English 'equity' had almost precisely similar origins, in the claim of the King's prerogative to redress the grievances of his subjects, and that they differed mainly, if not entirely, in the fact, that the older tribunals, having adopted a special form of procedure for dealing with these grievances, and offered their remedies

³¹ 13 EDW. I, st. I, c. 24 (2). Of course the importance of the action of 'Case,' introduced by this provision, must not be underestimated. (As to this, see the author's *SHORT HISTORY OF ENGLISH LAW*, at pp. 137-45.) Still it is clear that, for some reason, this provision had only a limited operation.

³² See especially Mr. Bolland's edition of *THE EYRE OF KENT* (in 1313-14) for the Selden Society (Vols. 24, 27, 29), especially Vol. 27, pp. xxi-xxx, and the articles of Dr. Hazeltine, 'Early History of English Equity,' in *ESSAYS IN LEGAL HISTORY*, Oxford, 1913, and Professor G. B. Adams, 'Origin of English Equity,' 16 *COL. L. REV.* 87. See also Mr. Bolland's *SELECT BILLS IN EYRE*, also in S. S. series (Vol. 30).

on these terms as a matter of right, rejected other forms of procedure (and, almost inevitably, therefore, all grievances which were not capable of being dealt with by that procedure), while the Chancellor made a new and vigorous, but discretionary,³³ use of the rejected grievances and others of a similar nature, and thus rapidly built up a large supplementary jurisdiction.

Is there any real reason to doubt that, in framing the rules of Equity, the Chancellors relied mainly on the materials which had previously served for the formulation of the common law? The Chancellors did not, of course, underestimate the value of popular catchwords, such as 'grace,' 'conscience,' and 'equity' — *i. e.*, equality; but these served them rather as ideals than as practical guides. It may be that we owe one or two equitable doctrines (*e. g.*, the doctrine of 'clogging the equity of redemption'³⁴) to the Canon Law, or to the Roman Law.³⁵ Most of the early Chancellors had a bowing acquaintance, at least, with one or other of these systems. But can any one doubt that, under such vague expressions as the 'Law of Nature' or the 'principles of Equity,' what the early Chancellors really did was to sanction and enforce rules of conduct which had already established themselves among the better members of the community — that when, for example, they began to enforce uses or trusts, they merely bound the lower type of citizen to do what every decent citizen already felt himself bound to do, or that, when they laid down the famous maxim: 'once a mortgage, always a mortgage,' they merely formulated a principle upon which all reasonable mortgagees, as distinguished from sharks of the type of Trapbois, already acted?

Is this a suggestion which belittles the high office of the judge as an expounder of law, or which the judges themselves would repudiate? To the latter question, the frequent appeals of the common law judges to the conduct of the 'average reasonable citizen' in fixing the standard of negligence, or of the Equity judges to the 'man of ordinary prudence' in the administration of trusts³⁶

³³ The principle that the common law is *ex debito justitiæ*, while Equity is *ex gratiâ*, is, perhaps, the most fundamental distinction between common-law and equity still subsisting.

³⁴ The connection was probably through the Usury Laws.

³⁵ A good example is the well-known equitable doctrine of 'marshalling,' which is the Roman *subrogatio*.

³⁶ See the well-known *dictum* of Lord Watson, in *Learoyd v. Whiteley*, L. R. 12

would seem to furnish a negative reply; even if the famous doctrine of the universal competence and completeness of the common law, above referred to, were not itself a negative answer. The former will hardly be answered in the affirmative by any competent critic who ponders for a little the difficulties which surround the delicate task of rightly interpreting that subtle but all-important thing, public opinion. Assuredly, it is no easy task for a judge, when confronted with a case for which there is no precedent, to formulate a decision which shall commend itself to the sense of justice — not merely of the litigants before him (who may be considered to be prejudiced), but to the right-thinking members of the community who may be litigants in the future. And, in performing this difficult task, can he have any better guide than the rules of conduct which those right-thinking citizens have already adopted as the result of that subtle process of experiment in the laboratory of life which we call 'practical experience'? A judge must indeed have confidence in his own wisdom beyond the measure of ordinary modesty who will deliberately defy such a guide. That would be to apply *arbitrium*, not *interpretatio*.

If the suggestion thus imperfectly stated be at all near the truth, the scope of judiciary law (perhaps even of parliamentary legislation, though that is another story³⁷) is fairly indicated. A tribunal is bound to follow precedent where it is clear and authoritative, at least unless the precedent is manifestly founded on a mistake, or the conditions have changed; because certainty is even more important in the administration of justice than wisdom. Perhaps the most remarkable testimony to this truth which comparatively recent years have produced is the changed attitude of the House of Lords toward its own former judgments. Down to the middle of the nineteenth century,³⁸ the House declined to be bound by judicial decisions, even by its own. The doctrine is now the other way; and the House of Lords has thus avowedly given

A. C. 727, 733 (1887), and the earlier *dictum* of Lord Blackburn in *Speight v. Gaunt*, L. R. 9 A. C. 1, 19 (1883).

³⁷ The writer has suggested grounds for thinking that the limits of parliamentary legislation in civil law are hardly different, in his *SHORT HISTORY OF POLITICS* (Dent), pp. 128-29.

³⁸ The critical decisions are *Thellusson v. Rendlesham*, 7 H. L. Cas. 429 (1859); *Att.-G. v. Dean and Canons of Windsor*, 8 H. L. Cas. 369 (1860); and *Beamish v. Beamish*, 9 H. L. Cas. 274 (1861).

up³⁹ its claim to combine its judicial and legislative functions in a single session. But that fact does not relieve the House of Lords (or any other tribunal) from the duty of deciding a case, on the ground of want of precedent or statutory provision. Such a refusal would be a gross breach of duty. In such a case the Court turns, as has been suggested, to the deep well, not of 'public opinion' in the speculative sense, but of public conviction, as evidenced by the conduct of the most upright and experienced members of the community. To appeal to an ideal above or beyond this standard, is to run the risk of creating a precedent which will be regarded with dislike, as 'crotchety,' or 'unpractical'; to act in deliberate defiance of this standard is to invite a reaction which, in its desire to abolish an unpopular decision, may proceed to disastrous lengths.

Having thus considered some of the chief characteristics of English Civil Law, we may proceed to ask ourselves how far they indicate and satisfy the scope and functions of law generally.

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(To be continued)

³⁹ The constitutional importance of the change has hardly received the notice it deserves. The legislative functions of the Great Council have never been formally abolished. Were they finally abandoned in *Beamish v. Beamish*?